Supreme Court, U.S.
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No. 00-425

IN THE

# Supreme Court of the United States

DANIEL C. CRANE,

*Petitioner,*

*v.*

DONALD K. STERN,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* NATIONAL ORGANIZATION OF BAR COUNSEL IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICUS CURIAE*

The National Organization of Bar Counsel (NOBC) is a non-profit organization whose members enforce ethical rules that regulate the professional conduct of lawyers. More than four hundred fifty (450) members of NOBC serve as disciplinary counsel to state and federal courts and bar associations in all the disciplinary jurisdictions in the United States.[1] Most of the NOBC members work under the auspices of a state's highest court and/or the state bar association responsible for the regulation of the bar. The NOBC assists lawyer disciplinary agencies by providing training to its members, preparing an annual compilation of case summaries on attorney disciplinary matters, offering information on specific legal subjects such as ethical rules and professional responsibility issues, and advocating positions on behalf of its members with the American Bar Association and other entities with interests in the regulation of lawyer discipline and professional responsibility matters for lawyers.

NOBC's interest as an amicus in this case is to express its serious concern with, and opposition to, the holding in the decision of the First Circuit Court of Appeals in *Stern v. United States District Court for the District of Massachusetts, et al.*, 214 F.3d 4 (1st Cir. 2000), which endorses the position of the Justice Department that its lawyers can be exempted from abiding by some state ethical rules, adopted by a state's highest court, and incorporated by a United States District Court. In the opinion of NOBC, if this ruling is not reversed, it will lead to serious problems for bar disciplinary counsel in all jurisdictions.

1. Counsel for the *Amicus* were the sole authors of this brief and no person or entity other than the *Amicus* made a financial contribution to this brief. The consents of the parties have been lodged herewith.

## STATEMENT OF THE CASE

Amicus Curiae relies on the Statement of the Case submitted by the Petitioner, Daniel C. Crane, Bar Counsel, *et al.*, in his Petition for a Writ of Certiorari.

## REASONS FOR GRANTING CERTIORARI

There are two major reasons why this Court should grant certiorari. First, this decision will create a situation in which there will be unequal treatment of attorneys practicing in a jurisdiction. While all other lawyers will be required to abide by all ethical rules promulgated by a state and incorporated by a United States District Court, Justice Department attorneys will be required to obey only those professional conduct rules it deems are consistent with federal law or procedure. No other lawyer has that right of determination. This ruling usurps the authority of the state and federal courts to establish and enforce ethical rules for all lawyers who are members of the bar of that state, and thereby will restrict bar disciplinary agencies' enforcement authority.

Second, this ruling allows the Justice Department to decide unilaterally which ethical rules it chooses to follow and which will not apply to its lawyers. Such authority very likely will lead to serious problems for disciplinary counsel in enforcing the ethical rules insofar as Justice Department attorneys are concerned and will undermine the authority of the bar disciplinary agencies.

## ARGUMENT

### I.

### THE JUSTICE DEPARTMENT'S LAWYERS SHOULD BE HELD TO THE SAME ETHICAL STANDARDS AS ALL OTHER ATTORNEYS

Regulation of attorneys has traditionally been a function of the fifty-one states.[2] While the American Bar Association has sought to provide a national set of standards, first through the Model Code of Professional Responsibility[3], and then through the Model Rules of Professional Conduct[4], there is no national set of rules. Each state has chosen to adopt some version of the ABA's model code and rules with modifications.[5] Ethical codes for lawyers are adopted by the states, usually through their highest courts, by rule.[6]

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2. Coquillette and Leary, Working Papers of the Committee on Rules of Practice and Procedure, "Special Studies of Federal Rules Governing Attorney Conduct", Administrative Office of the United States Courts (September, 1997), p. 4.

3. American Bar Association, Model Code of Professional Responsibility, adopted originally by the ABA House of Delegates in August, 1969, and amended many times until the ABA adopted the Model Rules in 1983. *See* FN #4, ante.

4. American Bar Association, Model Rules of Professional Conduct, adopted originally by the ABA House of Delegates in August, 1983, and amended many times since, most recently in February, 2000.

5. Gillers and Simon, Regulation of Lawyers, Statutes and Standards, 2001, Aspen Publishers, pp. xxiii-xxiv.

6. *See, e.g.* Massachusetts Supreme Judicial Court Rule 3:07, 426 Mass. 1301 (1997), effective Jan. 1, 1998.

This Court has recognized the role of the states in adopting ethical codes for lawyers. *Nix v. Whiteside*, 475 U.S. 157 (1986).

The federal courts have not adopted separate ethical codes. Pursuant to the 1988 Amendments to the Rules Enabling Act, 28 U.S.C. § 2073, most of the U.S. District Courts[7] have incorporated state ethical codes for lawyers by reference.[8] A lesser number have adopted the ABA Model Rules by reference.[9] Still others have adopted both the relevant state standards and the ABA Model.[10] The benefit of federal courts adopting state ethical codes is to have one set of ethical rules in the jurisdiction for all lawyers. While the federal courts, through the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the Standing Committee), have considered, and continue to have under consideration, either their own set of ethical rules for lawyers, or some specific changes in the ethical rules for federal courts, as of this time, the Standing Committee has rejected the idea of separate federal ethical rules.[11]

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7. According to Coquillette and Leary, (*See* FN #2 above), 76% of the federal districts with attorney conduct rules incorporate the relevant standards of the state in which the district is located, at p. 341.

8. *See, e.g.* Local Rule 83.6, D. Mass.

9. As of 1997, 9% of federal districts with attorney conduct rules had adopted the Model Rules. *See* Coquillette and Leary, op. cit., at p. 341.

10. As of 1997, 14% fit into this category. *See* Coquillette and Leary, at p. 341.

11. *See* "FRAC Models dated February 25, 2000", Administrative Office of the United States Courts, in which it is

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Bar discipline involves the enforcement of the standards of professional conduct adopted in a jurisdiction. For bar discipline to operate effectively, it is critical that there be, within each jurisdiction, rules for lawyer regulation which apply to all lawyers in the jurisdiction. Where either the state court or the federal court has adopted professional conduct rules by the proper procedures, those rules should apply without distinction to all lawyers within that jurisdiction. While the ultimate objective of bar discipline is protection of the public, the "judiciary as well as the public is dependent upon professional ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex County Ethics Committee v. Garden State Bar Association, et al.*, 457 U.S. 423, 434 (1982). This Court's proper role only should extend to ensuring that the ethical standards imposed upon attorneys in federal court comply with federal law, *In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992), do not infringe upon an individual's constitutional rights, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and that the procedures adopted for the enforcement of the disciplinary rules do not violate the right to due process of law. *In re Ruffalo*, 390 U.S. 544 (1968)

There is little dispute that evenhandedness in compliance with professional standards is a laudable goal. The desirability of equal application of the ethical rules for all attorneys within a jurisdiction recently was recognized by the United States Congress, when it enacted a bill entitled,

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noted that "(T)he theme common to all these (FRAC) variations is that all district courts and courts of appeal would look to state law for rules of professional responsibility." at p. 1.

"Ethical standards for attorneys for the Government." (McDade Amendment). This legislation provides that:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state. 28 U.S.C. § 530(B)

The Conference of Chief Justices, in 1994, expressed a similar view when it passed a resolution stating, *inter alia*, the following:

> (3) Without regard to the adoption of the Proposed Rule by the Attorney General, the Conference respectfully urges each of its members to continue to enforce the ethical rules upon *all members of bars* of the various states and jurisdictions. (*emphasis added*)[12]

This organization previously has expressed the same view in a letter to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, by stating that allowing federal prosecutors to operate under different rules would "pre-empt the enforcement mechanisms established by the Courts to oversee the professional conduct of attorneys admitted before the various high courts.[13] In this amicus brief, the NOBC

12. Forty-sixth Annual Meeting of the Conference of Chief Justices, Resolution XII, "Proposed Rule Relating to Communications with Represented Persons", August 4, 1994.

13. Letter of Michael J. Oths, President, National Organization of Bar Counsel, Bar Counsel, Idaho State Bar, to the Honorable (Cont'd)

strongly urges this Court to recognize that it is of critical importance to the effective functioning of bar disciplinary enforcement that the ethical rules within a jurisdiction are applied without any distinctions and evenhandedly, regardless of the position or the status of the lawyer.

## ARGUMENT

## II.

## FEDERAL PROSECUTORS SHOULD NOT BE ABLE INDEPENDENTLY TO SELECT THE ETHICAL RULES THEY WILL FOLLOW

This is not the first time that a conflict has arisen on the issue as to whether federal prosecutors must follow state court or federal court adopted ethical rules. The United States Justice Department previously has issued its own regulations regarding what procedures its lawyers should follow with regard to Model Rule 4.2, the rule prohibiting contact with a represented person. The Justice Department's own rule provides as follows:

> A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for

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Orrin Hatch, Chair Senate Committee on the Judiciary, dated March 10, 1999, reprinted in "The Effect of State Ethics Rules on Federal Law Enforcement," Hearing before the Subcommittee on Criminal Justice Oversight of the Committee on the Judiciary, United States Senate, One Hundred Sixth Congress, First Session, March 24, 1999, pp. 103-106.

> purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high-level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter. 28 C.F.R. § 77.10(a)[14]

The majority of courts generally have held that such regulations do not have the force of law. *See, e.g. United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998).

Other attempts by the Justice Department to exempt its lawyers from ethical rules that all other lawyers must obey have come under justifiable criticism. In the hearings held on the McDade Amendment, the Conference of Chief Justices objected to any exemption when it submitted to the Hearing Committee a Resolution it adopted unanimously on August 4, 1994, stating in pertinent part as follows:

> (5) The state supreme courts cannot permit one class of lawyers (in this case lawyers employed by the Department, an agency of the executive branch of the federal government), unilaterally to exempt itself from the ethical rules imposed upon all lawyers by the judiciary

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14 . This rule began as a policy issued in a Memorandum from United States Attorney General Richard Thornburgh to All Justice Department Litigators, June 8, 1989. It was subsequently promulgated as a rule issued pursuant to 5 U.S.C. § 301 by the Attorney General of the United States.

imposed upon all lawyers by the judiciary of each state and the local federal district courts.[15]

The American Bar Association's Committee on Professional Ethics also has criticized the Justice Department's attempts to exempt its lawyers from selected ethical rules. The Committee has stated that it is clear that Rule 4.2 applies to the conduct of lawyers in criminal as well as civil matters, including both federal and state prosecutors. While the Justice Department has argued, inter alia, that because the Rule applies to a lawyer only "[i]n representing a client," the Rule does not reach the conduct of a prosecutor since she does not represent a "client" in the ordinary sense, the history of the Rule and its predecessors offers no support for any assertion that it was intended to exempt prosecutors. ABA Formal Opinion 95-396 (1995)

Several federal district courts have reported problems with federal agencies that have promulgated their own attorney conduct rules when those rules conflict with the local rules adopted by the U.S. District Courts.[16] While the problems so far have been limited to Rule 4.2 and Rule 3.8, there are other rules that NOBC is concerned may be susceptible to independent interpretation by the Justice Department. For example, in an effort to protect confidential

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15. "Ethical Standards for Federal Prosecutors Act of 1996", Hearing before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, One Hundred Fourth Congress, Second Session, on H.R. 3386, September 12, 1996, U.S. Government Printing Office, Washington: 1997 at p. 64.

16. Coquillette and Leary, op. cit., at p. 387.

informants or cooperation agreements that the government does not want revealed, *see, e.g.*, *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), the Justice Department could issue its own interpretation of Model Rule 3.3, requiring a lawyer not to make false statements of material fact to a court or to fail to disclose a material fact to a court. It also could formulate its own interpretation of Model Rule 3.4(f), which prohibits a lawyer from requesting a person other than a client to refrain from voluntarily giving relevant information to another party. *See, e.g.*, *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966)[17] These are but two example of possibilities where great mischief could be created with regard to independent interpretations of the ethical rules.

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17. *See also* 90 ALR 3d 1231 for a compilation of cases, statutes, and ethical rules relating to interference with interrogation of witnesses.

## CONCLUSION

It is the responsibility of NOBC's members to safeguard the integrity of the legal profession within their jurisdictions. It will be impossible to fulfill this duty where one group of lawyers are unconstrained by the ethical rules they chose not to obey. Bar disciplinary agencies only can operate effectively if all the lawyers within their jurisdiction must abide by all the same rules. Without such evenhandedness of enforcement, the public interest and the reputation of the bar will be tarnished. If the First Circuit's decision stands, there is a substantial likelihood that bar discipline will be compromised seriously. For that reason, and the reasons stated above in our Arguments, NOBC urges this Court to grant certiorari on this case.

Respectfully submitted,

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